

³ The Board notes that, following the May 18, 2020 decision, OWCP received additional evidence and appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's May 6, 2020 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On September 8, 2016 appellant, then a 45-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on September 1, 2016 she sustained injuries to her right side, upper left leg, buttock, and hip area when removing a wheelchair with oxygen from the rear of a van while in the performance of duty. She stopped work on October 17, 2016. On October 26, 2016 OWCP accepted the claim for lumbar spine and left hip sprain. On April 23, 2018 it expanded acceptance of the claim to include lumbar radiculopathy. OWCP paid appellant wage-loss compensation on the supplemental and periodic rolls through March 31, 2018.

On March 19, 2018 appellant returned to work in a modified limited-duty position.

Appellant filed claims for compensation (Form CA-7) for disability from work commencing June 14, 2018.

By decision dated January 17, 2019, OWCP denied appellant's claim for compensation for disability commencing June 14, 2018. It explained that the medical evidence supported that appellant could perform a limited-duty job and that she had been performing a limited-duty job since March 9, 2018, which was in accordance with the restrictions provided by a second opinion physician and an impartial medical examiner.

On May 6, 2020 appellant filed a request for reconsideration.

OWCP received additional evidence including: numerous treatment notes from Dr. Thomas E. Martens, an osteopath specializing in family medicine, dated November 20, 2018 through December 10, 2019; letters of medical necessity and requests for upgrade to include additional medical conditions from Dr. Martens dated January 21 and May 5, 2020; duty status reports (Form CA-17) from Dr. Martens dated January 23 and February 12, 2019; referrals for physical rehabilitation from Dr. Martens dated January 24, March 7, and September 6, 2019 and March 10, 2020; psychotherapy dated January 4 and February 15, 2019; x-rays of the right shoulder dated November 13, 2018; a July 18, 2019 x-ray of the lumbar, thoracic, and cervical areas of the spine; November 13, 2018, June 12, August 14, September 11, 2019, and January 22 and 29, 2020 diagnostic tests; an August 26, 2019 computerized tomography (CT) scan of the lumbar spine; magnetic resonance imaging (MRI) scans of the lumbar spine dated June 29, 2017 and June 24, 2019; an August 26, 2019 operative report; physical therapy notes dated April 18, 2018 to April 15, 2020; and treatment notes from Dr. Torrence J. Stepteau, a pain medicine specialist, dated July 30 and September 11, 2019, and January 22, 2020. OWCP also received progress reports from physician assistants in Dr. Martens' and Dr. Stepteau's offices dated December 5, 2018 to March 9, 2020.

By decision dated May 18, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ The one-year period for requesting reconsideration begins on the date of the original OWCP decision, but the right to reconsideration within one year also accompanies any subsequent merit decision on the issues, including any merit decision by the Board.⁶ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁷ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁸

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁹ OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.¹⁰ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹¹

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by OWCP.¹² The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the

⁴ 5 U.S.C. § 8128(a); *see T.J.*, Docket No. 21-0586 (issued September 30, 2021); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (February 2016).

⁷ *Id.*

⁸ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁹ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

¹⁰ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

¹¹ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹² *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹³

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence, which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report, which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹⁴ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁵

ANALYSIS

The Board finds that OWCP properly determined that appellant's request for reconsideration was untimely filed.

The last merit decision was issued on January 17, 2019. As her request for reconsideration was not received by OWCP until May 6, 2020, more than one year after the January 17, 2019 merit decision, pursuant to 20 C.F.R. § 10.607(a), the request for reconsideration was untimely filed. Consequently, appellant must demonstrate clear evidence of error by OWCP in denying the claim.¹⁶

The Board further finds that OWCP summarily denied appellant's request for reconsideration without complying with the review requirement of FECA and its implementing regulations.¹⁷

As noted, section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁸ Its regulations at 20 C.F.R. § 10.126 provide that the decision of the Director of OWCP shall contain findings and facts and a statement of reasons.¹⁹ As well, OWCP's procedures provide that the reasoning behind

¹³ *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹⁴ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹⁵ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁶ 20 C.F.R. § 10.607(b); *S.C.*, Docket No. 20-1537 (issued April 14, 2021); *R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁷ *See Order Remanding Case, W.D.*, Docket No. 20-0859 (issued November 20, 2020); *Order Remanding Case, C.G.*, Docket No. 20-0051 (issued June 29, 2020); *Order Remanding Case, T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607(b).

¹⁸ 5 U.S.C. § 8124(a).

¹⁹ 20 C.F.R. § 10.126.

OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence, which would overcome it.²⁰

In the May 18, 2020 decision, OWCP failed to analyze the evidence submitted on reconsideration as to whether it was sufficient to demonstrate clear evidence of error. The Board, thus, finds that OWCP failed to properly explain the findings with respect to the issue presented so that appellant could understand the basis for the decision, *i.e.*, whether she had demonstrated clear evidence that OWCP's last merit decision was incorrect.

The Board will, therefore, set aside OWCP's May 18, 2020 decision in part and remand the case for findings of fact and a statement of reasons regarding clear evidence of error, to be followed by an appropriate decision on appellant's untimely reconsideration request.

CONCLUSION

The Board finds that appellant's request for reconsideration was untimely filed. The Board further finds that the case is not in posture for decision regarding whether he has demonstrated clear evidence of error.

²⁰ Federal (FECA) Procedure Manual Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013) (all decisions should contain findings of fact sufficient to identify the benefit being denied and the reason for the disallowance).

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 13, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board